12-15-2016

Weymiller v. Lockheed Idaho Technologies Respondent's Brief Dckt. 44109

IN THE SUPREME COURT FOR THE STATE OF IDAHO

Penny Weymiller, Appellant, v. Lockheed Idaho Technologies, Employer, and Employer Insurance of Wausau, Surety, Defendants.	)	Supreme Court No. 2000-019910 **RESPONSIVE BRIEF OF DEFENDANT/RESPONDENTS LOCKHEED IDAHO TECHNOLOGIES CO. AND EMPLOYERS INSURANCE OF WAUSAU.** Supreme Court No. 44109

RESPONSIVE BRIEF OF DEFENDANT/RESPONDENTS LOCKHEED IDAHO TECHNOLOGIES CO. AND EMPLOYERS INSURANCE OF WAUSAU.

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO
R. D. MAYNARD, CHAIRMAN

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STATEMENT OF THE CASE

I. Nature of the Case

Claimant/Appellant, Penny A. Weymiller ("Claimant"), is represented by herself. Respondents/Defendants, Lockheed Idaho Technologies Co. ("Defendant/Employer"), and Employers Insurance of Wausau ("Defendant/Surety"), are represented by Matthew J. Vook of the Law Offices of Kent W. Day, Meridian, Idaho.

This matter was heard at the Industrial Commission Field Office, 1820 East 17th Street, Suite 300, Idaho Falls, Idaho, on June 29, 2015. Industrial Commission ("Commission") Referee LaDawn Marsters presided. Penny A. Weymiller ("Claimant") was present in person and represented herself. Defendants Lockheed Idaho Technologies Co. ("Employer") and Employers Insurance of Wausau ("Surety") were represented by attorney Lea L. Kear of the Law Offices of Kent W. Day, Meridian, Idaho. *Clerk's R. 10.* Claimant and Claimant's witness, Leslie Soderquist, gave live testimony at the hearing. *Clerk's R. 12.* Claimant's Exhibits A through C and Defendants' Exhibits 1 through 3 and 5 through 8 were admitted into evidence. *Clerk's R. 12.* No post-hearing depositions were undertaken.

On February 23, 2016, the Commission issued its Order in this matter adopting the proposed decision of Referee John C. Hummel. *Clerk's R. 25-26.* The Commission found that Claimant had

not proven her entitlement to additional medical care. *Clerk's R. 25.* On April 5, 2016, Claimant filed her Notice of Appeal to the Idaho Supreme Court. *Clerk's R. 27.* On June 21, 2016, the Industrial Commission filed the Certification and Completion of the Record. *Clerk's R. 37-38.*

II. Course of Proceedings Below

Appellant filed a Worker's Compensation Complaint on August 22, 2013 for an injury as a result of her employment from March of 1991. *Clerk's R. 1-7.* On September 13, 2013 Defendants filed their Answer to Claimant's Complaint for the 1991 injury. *Clerk's R. 8-9.*

On June 29, 2015, Referee LaDawn Marsters conducted a hearing in Idaho Falls. The issues presented at hearing consisted of:

1. Whether Claimant had complied with the notice limitation set forth in Idaho Code §§ 72-701 through 72-706;
2. Whether Claimant sustained an injury from an accident arising out of and in the course of employment;
3. Whether and to what extent Claimant is entitled to medical care.

Clerk's R. 10. Subsequent to the hearing, Referee Marsters left the employ of the Commission, and the case was reassigned to Referee John C. Hummel. *Clerk's R. 10.* The parties submitted post-hearing briefs. On February 23, 2016, the Commission issued its Order adopting the Findings of Fact, Conclusions of Law, and Recommendation of Referee Hummel. *Clerk's R. 25-26.* The Commission found the Appellant had not proven her entitlement to additional medical care. *Clerk's R. 25.* The Appellant filed her Notice of Appeal with the Idaho Supreme Court on April 5, 2016. *Clerk's R. 27.*

III. Statement of Facts

Appellant asserts work-related onset of bilateral carpal tunnel syndrome ("CTS") on or about March 1, 1991, while employed by Defendant, Lockheed Idaho Technologies. *Hr'g*

Tr.13:14-15; Cl.'s Ex. B:2. The claimed condition was originally denied by Surety. *Cl.'s Ex. B:3.* A Notice of Injury and Claim for Benefits, dated July 28, 1994 was prepared and filed by Linda Sundberg, Workers' Compensation Administrator for EG&G Idaho, Appellant's employer at that time. *Cl.'s Ex. B:2.* On March 1, 2000, Appellant filed a Workers Compensation Claim Report, alleging the need for medical care related to the CTS condition, ongoing since 1991. *Defs.' Ex. 1:1; Defs.' Ex. 8:94.* After re-evaluation by Surety, including an interview of Appellant wherein she stated that she first developed symptoms of CTS at work in 1991 and that those symptoms had always been present since 1991, the previous denial was reversed. *Cl.'s Ex. B:3-4.* Appellant received notification of the acceptance of her medical condition of bilateral CTS and eligibility for related medical treatment by letter from Surety Claims Examiner Bradley Street, dated May 30, 2000.[1] *Id.*

Pursuant to referral by INEEL Occupational Medical Program ("OMP")[2] physician, William Belk, M.D., Appellant was evaluated for bilateral wrist pain on November 14, 2000, by hand surgeon, Timothy Thurman, M.D. *Cl.'s Ex. A:1*; *Defs.' Ex. 8:87-106.* Appellant reported the bilateral CTS symptoms began in 1991 when she was working as a data entry clerk. *Cl.'s Ex. A:2.* She began having aching wrists bilaterally with keyboarding, gripping, driving, and hammering. *Id.* Appellant asserted the aching was helped with splinting continually at night and approximately 80% of the daytime hours. *Id.* Appellant indicated the aching was becoming worse. *Id.* Dr. Thurman identified his impression of Appellant's conditions as:

> Bilateral wrist pain, which seems to be related to activity. By history, it is worse at night and reduced in intensity with wearing splints. Although, The patient does not have the

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[1]Pursuant to Idaho Code §72-706, Claimant was compensated for medical benefits only as the statute of limitations for indemnity benefits had passed. *Defs.' Ex. 3:21.*

[2]All of Claimant's medical care related to her bilateral CTS complaints prior to November 14, 2000 were provided through the on-site INEEL OMP. Claimant was seen at INEEL Occupational Medicine for carpal tunnel symptoms on May 24, 1999 (J. Constantino), February 24, 2000 (Dr. Johns), April 11, 2000 (Dr. Bush), May 2, 2000 (Dr. Belk), August 16, 2000 (Dr. Johns). *Defs.' Ex. 8:87-106.*

> classic history of median nerve compression at the carpal tunnel, she may fall into a category of patients who have essentially normal nerve studies with in fact symptomatic carpal tunnel syndrome.

Id. Dr. Thurman later remarked regarding Electrodiagnostic studies done by Dr. Clark Jaynes on October 18, 2000, that were negative for radiculopathy or nerve compression bilaterally. *Id.* However, it was noted similar studies in December, 1995, were positive for bilateral CTS. *Id.* Dr. Thurman performed a diagnostic steroid injection into the right wrist and recommended bilateral wrist x-rays be performed at OMP. *Cl.'s Ex. A:2-3.* At follow up on January 10, 2001, two weeks post-injection, Appellant reported a reduction in symptoms for two weeks post injection. *Cl.'s Ex. A:7.* Options discussed included bilateral CTS releases or a repeat steroid injection. *Id.* Appellant was next seen by Dr. Thurman on October 24, 2002, reporting improvement in her symptoms when INEEL ergonomically adjusted her workstation. *Cl.'s Ex. A:8.* She was laid off by INEEL, and upon starting work with new employer Portage Environmental Consultants ("Portage"), many of her previous symptoms had recurred, in addition to pain in the right lateral epicondyle region. *Cl.'s Ex. A:2; Hr'g Tr. 26:6-16.* Portage had not supplied ergonomic equipment. *Cl.'s Ex. A:2; Hr'g Tr. 26:6-16.* Appellant reported that the specific purpose of her follow up with Dr. Thurman was to request a letter recommending that Portage provide Appellant with an ergonomic chair, desk, and computer table. *Cl.'s Ex. A:2; Hr'g Tr. 26:6-16.*

Appellant next returned to Dr. Thurman on January 26, 2005, requesting a prescription for bilateral wrist splints, due to ongoing bilateral upper extremity symptoms consistent with CTS. *Cl.'s Ex. A:9.* He noted Appellant remained reluctant to pursue additional evaluation or intervention other than wrist splinting at that time. *Id.* Appellant was provided with a

prescription for new splints to be worn at night for ongoing dysethesias, and instructed to schedule office follow up as needed. *Id.*

On February 13, 2007 Appellant presented to Dr. Thurman complaining of persistent aching and intermittent paresthesias of the bilateral upper extremities despite near continuous use of wrist braces. *Cl.'s Ex. A:11-12.* Dr. Thurman requested Surety authorize staged CT release, right followed by left, six weeks apart. *Id.* Appellant contacted Dr. Thurman by phone in early March 2007, requesting work restrictions. *Defs.' Ex. 2:2.* Dr. Thurman requested Appellant return to his office on March 6, 2007, for discussion of her work activities. *Id.* At that time Appellant complained of aching and pain in both upper extremities. *Id.* Appellant was released to work a maximum of 25 hours per week, pending surgery. *Id.* Appellant was given a prescription for Darvocet to be taken at night to help with sleep due to pain in both upper extremities. Surgery was tentatively set for mid to late May. *Id.*

On April 17, 2007, Appellant returned to Dr. Thurman with ongoing symptoms of bilateral CTS. She reported continued use of Darvocet and wrist braces at night. *Defs.' Ex. 2:3-4.* Appellant reported right small finger paresthesias at night. *Id.* Examination revealed negative elbow flexion test and no evidence of Tinel around the cubital tunnel bilaterally. *Id.* Use of brace and 25-hour work week release was renewed and Darvocet prescription provided. *Id.*

Dr. Thurman performed open left carpal tunnel release on June 6, 2007. *Defs.' Ex. 2:6-7.* Appellant was seen for her two week post-op visit on June 21, 2007, reporting quite a bit of pain during the first post-op week and resolution of pre-operative numbness and tingling. *Defs.' Ex. 2:8.* Examination revealed healing surgical wound without evidence of complication. *Id.* Written and verbal instructions regarding splint use and activity were provided. *Id.* A work

release restricted working hours to 4 per day for one week, then 6 hours per day for one week, brace was to be utilized, and no left upper extremity lift/carry, push/pull, repetitive hand motion or climbing. *Id.*

Appellant presented to Dr. Thurman on July 3, 2007, for one month post-op visit, reporting recent return to work at 6 hours per shift with some left thumb discomfort. *Defs.' Ex. 2:10.* Work restrictions included continued 6 hour per day work schedule, no climbing, left hand occasional push/pull, repetitive hand motion, and carry/lift 10 pounds with the brace to be used as needed. *Defs.' Ex. 2:10-11.*

On July 24, 2007, Appellant was seen for her seven week post-op visit, continuing to complain of pain in her palm, but indicating physical therapy seemed to be helping. *Defs.' Ex. 2:5.* Physical therapy was continued, and a work release with continuation of previous restrictions was provided. *Id.*

Appellant presented for follow up on August 21, 2007, reporting slow improvement of left hand discomfort. *Defs.' Ex. 2:12-13.* Appellant reported she would soon start a new job requiring much less computer work. *Id.* Examination revealed continued healing of the surgical wound without evidence of problem, and near normal range of motion. *Id.* Therapy and continuation of previous work restrictions was recommended, with follow up in three weeks. *Id.*

Appellant reported to Dr. Thurman for follow up on September 20, 2007, reporting four weeks on her new job with workstation modifications completed at her new job site, and that she had experienced no left hand paresthesias for one month. *Defs.' Ex. 2:14-15.* Appellant was released to return to work in her regular position for the March 1, 1991, work incident without restrictions on September 20, 2007. *Id.* Medical stability was anticipated at the final examination in four weeks. *Id.* Appellant testified that she presented for the final examination,

but as she was late for her scheduled appointment time, Dr. Thurman could not see her. *Hr'g Tr. 28:22-29:2.* Appellant's testimony is unclear as to whether she attempted to reschedule the final examination. *Hr'g Tr. 29:3-8.* Appellant testified that "it just didn't happen, so the next time I went back to see him was to get – when I needed new wrist braces." *Id.* There are no further medical records from Dr. Thurman until October 25, 2012. *Defs.' Ex. 2:16-17.*

Appellant contacted Dr. Thurman's office in May, 2012, requesting to return for treatment. *Defs.' Ex. 2:16-17.* Surety authorized one follow-up appointment with Dr. Thurman to determine if there continued to be a causal connection between Appellant's current symptoms and the accepted 1991 industrial injury. *Defs.' Ex. 3:22.* Appellant canceled two appointments in June and July of 2012. *Id.*

Appellant eventually saw Dr. Thurman on October 25, 2012, reporting that after the CTS release, her symptoms did not resolve. Dr. Thurman wrote:

> ... In 2007, she underwent left carpal tunnel release. Though the record reflects Ms. Weymiller's bilateral hand paresthesisas resolving shortly after her left carpal tunnel release when she obtained a different job requiring less computer work, she indicates her symptoms did not significantly resolve. She complains of bilateral nocturnal numbness and aching in both hands. Her hands ache with driving and while riding her horse. Subjectively, her grip is diminished.

Defs.' Ex. 2:16-17. Appellant described her left wrist discomfort being primarily along the volar aspect and occasionally at the thumb basal joint. *Id.* She also complained of left elbow discomfort and reported she had been self-treating for suspected lateral epicondylitis with a counter-force brace. *Id.* The right upper extremity had similar, though less intense symptoms. She had been taking Ibuprofen for her discomfort, however experienced stomach irritation. *Id.* She also tried naproxen, which did not help as much as the Ibuprofen. *Id.* She denied any interval injury involving either upper extremity which could be responsible for these symptoms. *Id.* Dr. Thurman's impression was "Ill-defined bilateral upper extremity discomfort in each

volar forearm and wrist with lateral epicondylitis on the left." *Id.* He noted, "Provocative symptoms for carpal tunnel median nerve compression were only associated with mild left thumb tingling. Lateral epicondyle symptoms reportedly decreased since wearing the counter-force brace." *Id.* A trial NSAID was recommended and a prescription for Meloxicam 15mg daily was provided. *Id.* Appellant was given printed exercises for the lateral epicondylitis to "hopefully help the symptoms [resolve]." *Id.* Follow up was scheduled in one month. *Id.*

Appellant was next seen by Dr. Thurman on January 31, 2013. *Defs.' Ex. 2:18.* Appellant reported the trial of meloxicam did not provide any measureable benefit regarding her wrist discomfort. *Id.* The wrist discomfort was reportedly associated with prolonged computer, mouse and keyboard use and grip-type activities, with symptoms being in direct proportion to the amount of keyboard and mouse use being performed. *Id.* Along with wrist discomfort, Appellant also complained of numbness and nocturnal paresthesias, the intensity of which she directly related to the amount of keyboarding. *Id.* Dr. Thurman reported, "Therefore, **the patient believes this is directly related to her work.**" *Id.* After some discussion and detailed questioning, Dr. Thurman realized Appellant wanted authorization for new wrist braces. *Id.* A prescription was provided to Appellant, who indicated she did not intend to procure them until they were authorized by Surety. *Id.*

Appellant was last seen by Dr. Thurman on January 2, 2014. *Defs.' Ex. 2:20.* Her complaints remained unchanged. *Id.* Dr. Thurman noted that she "continues to experience bilateral hand pain which she associated with computer games." *Id.* Dr. Thurman's impression noted Appellant's symptoms to be very suggestive of bilateral wrist median neuropathy. *Id.* Dr. Thurman recommended referral to physiatrist Gary Walker, M.D. for consultation for general

overview of symptoms, with the option of electrodiagnostic testing if deemed appropriate by Dr. Walker. *Id.* Claimant did not follow up with Dr. Walker. *Hr'g Tr. 36:8-14.*

Appellant currently seeks medical treatment for her wrists, specifically wrist braces and pain medication. *Hr'g Tr. 39:6-10.*

IV. Issues on Appeal

Pursuant to Appellant's Notice of Appeal, the issue before this Court is:

> A. Whether the Industrial Commission erred in ruling the Claimant is not entitled to further medical care as per Idaho Code § 72-432(1).

ARGUMENT

I. RELEVANT LAW

A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability whether for an industrial accident claim or an occupational disease claim. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). The claimant must prove that there is a causal relationship between the employment and the need for medical care. *Henderson v. McCain Foods, Inc.,* 142 Idaho 559, 564, 130 P.3d 1097, 1102 (2006). "[T]his Court has unequivocally held that a claimant has the burden of proving causation." *Jordan v. Dean Foods*, 160 Idaho 796, 379 P.3d 1064, 1069 (2016).

The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are casually related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946,

866 P.2d 969 (1993)). "[T]he Commission may not decide worker's compensation cases without medical evidence." *Jones v. Emmett Manor*, 134 Idaho 160, 164, 997 P.2d 621, 625 (2000). "It is the Claimant who has the burden of proving the condition for which compensation is sought is casually related to an industrial accident." *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982).

Idaho law requires an employer to provide reasonable medical treatment after an industrial injury and for a reasonable time thereafter. Specifically, Idaho Code §72-432 provides in relevant part:

> (1) Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. (2) The employer shall also furnish necessary replacements or repairs of appliances and prostheses, unless the need therefor is due to lack of proper care by the employee.

Idaho Code 72-432. The Idaho Supreme Court has held that "generally a reasonable time would be as long as the condition exists." *Irvine v. Perry,* 78 Idaho 132, 299 P.2d 97 (1956). In determining whether a claimant has received reasonable medical care, attention must be given to the diagnosis made and the treatment provided. *Burch v. Potlatch Forests, Inc.*, 82 Idaho 323, 326, 353 P.2d 1076, 1077 (1960).

II. STANDARD OF REVIEW

In reviewing decisions by the Commission, "This Court exercises free review over the Commission's conclusions of law, but will not disturb the Commission's factual findings if they are supported by substantial and competent evidence." *Knowlton v. Wood River Med. Ctr.,* 151 Idaho 135, 140, 254 P.3d 36, 41 (2011) (citing I.C. § 72–

732). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *McNulty v. Sinclair Oil Corp.*, 152 Idaho 582, 584–85, 272 P.3d 554, 556–57 (2012) (quoting *Uhl v. Ballard Med. Prods., Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003)). "Substantial evidence is more than a scintilla of proof, but less than a preponderance." *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). The Court does not re-weigh the evidence, and "[t]he Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless they are clearly erroneous." *Knowlton*, 151 Idaho at 140, 254 P.3d at 41; *Lorca-Merono v. Yokes Washington Foods, Inc.*, 137 Idaho 446, 455, 50 P.3d 461, 470 (2002). All facts and inferences are viewed in the light most favorable to the party who prevailed before the Commission. *Zapata*, 132 Idaho at 515, 975 P.2d at 1180.

III. CONTENTIONS OF THE RESPONDENTS

A. The Industrial Commission properly concluded the Appellant lacked medical evidence to support that her current need for medical treatment is related to her industrial injury.

Respondents submit that the Commission properly found Appellant had failed to prove her case. Whether for an occupational disease or industrial accident,[3] Claimant must present evidence that relates the need for medical treatment and her employment. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). While not required to be through oral testimony, proof of medical causation requires medical evidence. *Jones v. Emmett Manor*, 134 Idaho 160, 164, 997 P.2d 621, 625 (2000).

[3] Respondents are unable to determine from the record whether Appellant argues her claim falls under § 72-438 as an occupational disease. As both an occupational disease and an industrial accident claim require proof a causal relationship, Respondents will not explore this issue further. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

Appellant simply failed to present any medical evidence that would support a finding that any ongoing issues with her wrists are related to her employment. Appellant has repeatedly contended that she suffers from carpal tunnel syndrome, and this condition is related to work. Respondents contend that based on Dr. Thurman's last note, it is unclear whether Appellant even has carpal tunnel syndrome. Respondents further assert that while the record is replete with references to Appellant's wrist issues, there is nothing in the record presenting medical evidence that supports a causal relationship between Appellant's wrist condition and employment.

Appellant indicated at hearing that she intended to depose Dr. Thurman, and, for whatever the reason, did not do so. *Hr'g Tr. 8:24-9:3.* The Commission cannot create or infer medical expert testimony or evidence where it does not exist. For that reason, Respondents offer that the Court should uphold the decision of the Industrial Commission.

B. Appellant's contentions that the Commission erred are without merit.

Appellant argues that the Industrial Commission erred by supporting denial of "an established workman's [sic] compensation claim for lack of work restrictions..." *Appellant's Br. at 4.* The Industrial Commission did not support the denial of claim for any reason relating to work restrictions; rather, "Claimant's case fails due to the lack of an expert medical opinion on causation..." *Clerk's R. 14.* A finding of whether Dr. Thurman provided work restrictions is entirely irrelevant to the decision of the Commission in this case.

Appellant also alleges that the Commission "totally ignored the testimony from Appellant's witness, Leslie Soderquist," and "also totally ignored the Appellant's photos," which were introduced at hearing as Claimant's Exhibit C. *Appellant's Br. at 4.* These contentions are not supported by the record. The Commission's adopted decision specifically notes the consideration of Ms. Soderquist's testimony and Claimant's Exhibit C. *Clerk's R. 12.* Appellant may not agree with

the Commission's ultimate findings, but that does not mean that the Commission did not properly consider her evidence.

CONCLUSION

Respondents respectfully pray that this Court not disturb the Commission's findings of facts as they are not erroneous and are supported by substantial and competent evidence.

Respectfully submitted this 15th day of December, 2016.

Law Offices of Kent W. Day

By: _____
Matthew J. Vook
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 2016, I caused a copy of the foregoing **RESPONSIVE BRIEF OF DEFENDANT/RESPONDENTS** to be served by first class mail, postage prepaid, upon the following:

Ms. Penny Weymiller, Pro Se
10324 W Arco Hwy
Idaho Falls, ID 83402

_____
Matthew J. Vook